UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

KAISER FOUNDATION HEALTH PLAN, INC.; KAISER FOUNDATION HOSPITALS; SOUTHERN CALIFORNIA PERMANENTE MEDICAL GROUP; AND THE PERMANENTE MEDICAL GROUP

Respondents

and **Case 32-CA-169979**

ENGINEERS AND SCIENTISTS OF CALIFORNIA, LOCAL 20 IFPTE, AFL-CIO/CLC,

Charging Party

BRIEF IN SUPPORT OF EXCEPTIONS OF RESPONDENTS TO THE DECISION OF THE ADMINISTRATIVE LAW JUDGE

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Pursuant to Section 102.46 of the Rules and Regulations of the National Labor Relations Board (the "NLRB"), respondents Kaiser Foundation Health Plan, Inc. ("KFHP"), Kaiser Foundation Hospitals ("KFH"), Southern California Permanente Medical Group ("SCPMG"), and The Permanente Medical Group, Inc. ("TMPG") (collectively, "Respondents" or "Kaiser") submit this Brief in support of its exceptions to Administrative Law Judge Lisa D. Thompson's August 24, 2018, Decision[1] in the above referenced matters.

I. INTRODUCTION

This appeal challenges the ALJ's misinterpretation and inexplicable rejection of Kaiser's policy which simply restricts employees' **personal** use of its email system. It is beyond dispute that Kaiser's Electronic Asset Policy, established for vitally important business reasons consistent with Kaiser's legal and ethical obligations to safeguard protected health information ("PHI") and to prevent cyber security breaches, is lawful and consistent with the National Labor Relations Act (the "Act"). After the Board majority issued its decision in *Purple Communications, Inc.*, 361 NLRB 1050 (2014), *appeal filed*, No. 17-70948 (9th Cir. April 3, 2017) ("*Purple Communications*"), the Electronic Asset Policy was amended to allow employees to use Kaiser's email system on non-working time for communications protected under Section 7 of the Act. What is left in the policy are restrictions on employees' personal use of Kaiser's email system.

Not only is the Electronic Asset Policy lawful on its face, there is no evidence that it was promulgated for any nefarious purpose. The policy does not limit protected Section 7 activities in any manner, and there is no evidence that the challenged portions of the policy were ever enforced. No statutory supervisor in Kaiser's employ has ever told an employee that they could not engage in protected activity as a result of the policy, and certainly no employee has ever been disciplined or suffered any adverse consequences under the sections of the policy that were in question. There is no evidence that any of Respondents' 200,000+ employees were affected by,

[1] Hereinafter, the Administrative Law Judge's Decision will be referred to as "ALJD" or "Decision" and the Administrative Law Judge will be referred to as "ALJ."

or ever felt inhibited by, the policy. The restrictions that were challenged in the complaint apply only to personal use of Kaiser's email system and do not infringe on statutory rights.

Here, Respondents except to the ALJ's findings and conclusions that two portions of the Electronic Asset Policy violate Section 8(a)(1) of the Act: section 5.2.1 (the "Incidental Use Subsection") and 5.2.2 (the "Mass Personal Messages Subsection"). The Incidental Use Subsection is designed to allow for incidental *personal* use of Kaiser's electronic assets, including its email system, while the Mass Personal Messages Subsection[2] prohibits the sending of mass *personal* messages that are entirely unrelated to an employee's work at Kaiser. It is apparent, particularly in the context of the entire written policy, and contrary to the ALJ's finding, that this language did not and could not be perceived by employees as restricting their Section 7 protected activities.

As a preliminary matter, if and to the extent that the Board reconsiders *Purple Communications*, then this case should be determined by the outcome of that decision.[3] The ALJ's decision and the position of Counsel for the General Counsel in this matter to date have been based solely and centrally on *Purple Communications*.

However, even if *Purple Communications* remains good law, the ALJ's finding that these policies are unlawful under *Purple Communications* is simply wrong. The Board majority in *Purple Communications* held that where an employer has already granted access to employees to

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[2] A "mass" email is defined as a single email addressed to 500 or more recipients. These limitations are built into Kaiser's email system functionality. The policy and the technological limitations on the system therefore only permits emails addressed to 499 or fewer recipients, without regard to the content of the emails.

[3] On August 1, 2018, the Board solicited the parties and interested amici to file briefs in *Rio All-Suites Hotel and Casino*, Case 28-CA-060841 ("*Rio All-Suites*"), addressing the following questions: (1) should the Board adhere to, modify, or overrule *Purple Communications*; (2) if overruled, should the Board return to the standard of *Register-Guard*, 351 NLRB 1110 (2007), *enfd. in part and remanded sub nom. Guard Publishing v. NLRB*, 571 F.3d 53 (D.C. Cir. 2009), *overruled by Purple Communications*, 361 NLRB at 1050, or adopt some other standard; (3) if the Board returns to the holding of *Register-Guard*, should the Board carve out exceptions for circumstances that limit employees' ability to communicate with each other through means other than their employer's email system and, if so, should the Board specify such circumstances in advance or leave them to be determined on a case-by-case basis; and (4) should the Board apply a different standard to the use of employer computer resources other than email and, if so, what should that standard be. On September 14, 2018, the General Counsel for the Board filed a brief urging the Board to overrule *Purple Communications*. The General Counsel's position in that brief is contrary to the position of Counsel for the General Counsel to date in this matter.

use its email system, employees could use email on non-work time to communicate about union activity and terms and conditions of their employment. Nothing in *Purple Communications* suggests that an employee has a right to use an employer's email system for purely personal reasons, let alone a right to send mass personal emails to more than 500 recipients. Accordingly, there is no basis, under *Purple Communications* or any other Board decision, for concluding that these policies violate the Act.

The ALJ also failed to apply the balancing test mandated by the Board in *Boeing Company*, 365 NLRB No. 154 (2017) ("*Boeing*"), to facially neutral policies like the ones at issue here. In *Boeing*, the Board ruled that, even if a rule may be interpreted to prohibit Section 7 activity, it will not violate Section 8(a)(1) where "the potential adverse impact on protected rights is outweighed by justifications associated with the rule." *Id.* at slip op. 15. The ALJ here did not apply established Board law and the ALJ grossly understated Kaiser's business interests and legal obligations to protect PHI for its 11 million+ members (Tr. 87:16), and failed to weigh this interest against the negligible potential impact the policies governing personal (and non-work related) emails may have on Section 7 rights.

Respondents respectfully request, as set forth more fully below, that the Board dismiss the allegations concerning the Electronic Asset Policy's Incidental Use Subsection and the Mass Personal Messages Subsection.

II. QUESTIONS PRESENTED

1. Whether the ALJ erred in finding and concluding that Kaiser's rule "limit[ing] employees' personal use of Respondents' email system during non-working time to usage that is 'incidental and limited in frequency and scope'" violates Section 8(a)(1) as a matter of law.
2. Whether the ALJ erred in finding and concluding that Kaiser's rule "prohibit[ing] employees from sending 'mass' personal messages on non-working time unless there is a clear business need and only if prior

authorization from management is obtained" violates Section 8(a)(1) as a matter of law.

3. Whether the ALJ erred in finding and concluding that the Incidental Use Subsection and Mass Personal Messages Subsection are not justified by special circumstances.

4. Whether the ALJ erred in finding and concluding that the balancing test mandated by *Boeing* does not apply in this case.

5. In the event that the Board overrules *Purple Communications,* whether the ALJ's Decision should be overturned and whether this case should be dismissed.

III. RELEVANT FACTS

A. Background Regarding Respondents And Its Electronic Asset Policy

Respondents are four distinct entities operating in the healthcare industry whose business is located primarily in California. (Tr. 82:12-15.) KFHP is the health plan organization that provides benefits to approximately 11.8 million Kaiser patients, or "members." (Tr. 61:18-21.) KFH holds, manages, and maintains all of the hospital facilities. (Tr. 61:24-25.) KFHP and KFH are both nonprofit entities that operate inside and outside California. (Tr. 61:21-62:2.) Conversely, TPMG and SCPMG provide medical care to Kaiser members in California, and have employees only in California. (Tr. 62:2-10; 113:5-10.) Respondents collectively employ nearly 200,000 employees. (Tr. 148:11-14.)

The Electronic Asset Policy, which has been in effect in pertinent part since 2008, governs employee use of Kaiser's electronic assets, including its computers, cell phones, and email systems, and which are made available for use during working hours. (Jt. Exh. 1; Tr. 75:9-10.) Respondents adopted the first version of the Electronic Asset Policy in February 2008. (Tr. 75:9-10.) The policy had been revised five different times between 2008 and 2015 to address various issues and concerns. (Tr. 84:23-85:1; R. Exh. 6.) In August 2009, the Board's Division of Advice reviewed and expressly approved Kaiser's Electronic Asset Policy, which contained

restrictions on incidental personal use and mass messages that were substantially similar to the current iteration of the policy. *See Kaiser Permanente*, 37 NLRB AMR 73 (2009). The Board found that the policy was facially valid and that Kaiser did not disparately enforce the policy against the alleged discriminatee.

The latest version of the Electronic Asset Policy went into effect on January 1, 2015. (Tr. 98:20-99:2.) It was specifically revised in 2015 to comply with the Board's holding in *Purple Communications*. (Tr. 96:15-24; 110:18-22; 111:7-9.) In Section 5.3.4 of the policy, Kaiser added references to Section 7 of the Act to state that "this provision does not apply to communications made by employees during non-working time that are protected under Section 7 of the National Labor Relations Act." (Tr. 96:8-14.) Additionally, to clarify that employees were permitted to discuss Section 7 protected subjects despite various restrictions within the policy pertaining to the protection of Confidential and Proprietary Information, revisions were made to the definition of Confidential and Proprietary Information to make clear that "Confidential information does not include information about wages, hours, benefits and other terms and conditions of employment." (GC Exh. 2 § 4.2; Tr. 88:17-89:5.) Kaiser also made minor modifications to the Personal Use Section, as described further below. In accordance with the Act, no employee has been disciplined, counseled, or warned for violating any provision of this latest Electronic Asset Policy. (ALJD, 5:33-36.)

The Counsel for the General Counsel challenged section 5.2 (the "Personal Use Section") of the Electronic Asset Policy, which includes two subsections, 5.2.1 (the Incidental Use Subsection) and 5.2.2 (the Mass Personal Messages Subsection).[4] The Personal Use Section is designed to allow for incidental *personal* use of Kaiser's electronic assets, including its email

[4] The case originally involved three sections of Respondents' Electronic Asset Policy, Sections 5.2.1, 5.2.2, and 5.3.8, which precludes employees from making audio, digital, or video recordings without the consent and authorization of everyone being recorded. After Respondents submitted supplemental briefing, on April 18, 2018, Counsel for the General Counsel sought leave to withdraw the complaint allegations regarding Section 5.3.8 in light of the Board's decision in *Boeing*. The ALJ granted the request.

system, but at the same time it forbids the sending of mass *personal* messages which are entirely unrelated to an employee's work at Kaiser.

B. The Personal Use Section Of The Electronic Asset Policy

Kaiser recognized that employees will have personal activities that occur during working hours, and therefore designed the Personal Use Section to permit incidental, limited personal use of the company's electronic assets. (Tr. 89:24-90:6.) The term "Personal Use" is defined in the policy as the "[u]se of KP Electronic Assets that is for personal reasons that do not relate to an employee's work for KP or other issues relating to KP." (GC Exh. 2 § 4.5.) Thus, on the face of the policy, the Personal Use Section does not apply to communications related to the workplace, including all Section 7-protected communications, and do not otherwise prohibit Section 7-protected communications. (*Id.*)

1. The Incidental Use Subsection of the Personal Use Section

Within the Personal Use Section, the Incidental Use Subsection addresses and limits the use of Kaiser's electronic assets for purely personal reasons that do not relate to the employee's work. The Incidental Use Subsection provides as follows:

> Personal Use of KP Electronic Assets, as defined in this policy, must be incidental, limited in frequency and scope, cannot incur additional costs to KP, and cannot impact employee performance.

(*See* GC Exh. 1 § 5.2.1.)[5] Because the policy applies only to the "Personal Use" of electronic assets, by its terms, the provision does not in any way limit employees' use of electronic assets for Section 7-protected communications—it limits only their use of electronic assets for purely personal reasons. (*Id.*)

Kaiser made revisions to the policy in 2015 to comply with the requirements of the NLRB as enunciated in *Purple Communications.* (Tr. 96:21-93:3.) The revisions included adding to the Electronic Asset Policy a definition of "Personal Use" as a defined term (as

[5] KP is a not for profit and accordingly federal tax laws limit the personal use that may be made of its assets by employees. *See* Internal Rev. Code § 501(c)(4).

distinguished from "Working Time," which was also added as a defined term) and added the words "as defined in the policy" to the language of the Incidental Use Subsection. (GC Exh. 2 (2015 Policy) §§ 4.5, 4.6, 5.2.1; Tr. 89:6-19.) These changes clarified that the Incidental Use Subsection applied *only* to the "Personal Use" of electronic assets, as defined in the policy. The remaining language in the Incidental Use Subsection remained unchanged from its prior iteration.

2. The Mass Personal Messages Subsection of the Personal Use Section

Also within the Personal Use Section, the Mass Personal Messages Subsection addresses and limits the sending of *personal* emails to a large number of recipients where there is no business need to do so. On its face, the Mass Personal Messages Subsection limits only the sending of mass *personal* messages having nothing to do with the workplace, and provides as follows:

> Employees should not send "mass" **personal messages** (sent to large numbers of recipients). For example, employees may not use KP's Electronic Assets to initiate or forward chain letters, jokes, or other **personal mass mailings** that have no business purpose. Employees may only send authorized messages to large numbers of recipients when there is a clear business need to do so, and only as authorized by the appropriate KP manager.

(*See* GC Exh. 2 § 5.2 (emphasis added).)

Kaiser initially adopted a prohibition on employees from sending mass emails in 2008 to address the persistent and continuing problem of employees' use of company networks and email systems to forward email or chain letters to large numbers of recipients, which created an unnecessary drain on Kaiser's network systems. (Tr. 79:15-19; 84:17-22; 95:14-17; *see* R. Exh. 1 (2008 Policy) § 5.2.4.) In 2015, when the policy was revised after the Board's decision in *Purple Communications,* the mass email prohibition was moved from the section describing general prohibitions on the use of electronic assets to the "Personal Use" section, and language was added to limit the provision to mass **personal messages** only. (*Compare* R. Exh. 1 (2008

Policy) § 5.2.4 *with* GC Exh. 2 (2015 Policy) § 5.2.2; Tr. 90:7-91:18.) These changes make clear that the Mass Personal Messages Subsection applies only to "Personal Use" of Kaiser's electronic assets.

Indeed, the mere act of sending a "mass" email to thousands of users will cause a significant performance hit on Kaiser's email systems. (Tr. 137:9-138:10.) The numerous recipients may naturally be prompted to "reply all" to the entire recipient list. Even in the case of 100 to 200 recipients, responses to a mass email can cause technical issues. (*Id.*) These issues multiply exponentially if the mass email was sent to all of Kaiser's employees—approximately 200,000 recipients. (Tr. 148:11-14; 161:1-9.)

By contrast to mass emails sent by individual employees, those sent by qualified Kaiser administrators pose less of an issue because they can configure email message settings on the emails which they send, and which are work-related to mitigate the undesired impact on system performance. (Tr. 150:1-18.) For instance, administrators can "blind copy" recipients, which means that recipients cannot simply click "reply all" to other recipients. (*Id.*) Administrators can also disable responses entirely to avoid the problem of users automatically responding and forwarding the mass email to even more recipients. (*Id.*) Ordinary employees who are unfamiliar with these settings options are less able to mitigate the impact of a mass email on the system. (*Id.*)

The restrictions on sending mass **personal** messages address another equally valid concern separate and apart from network integrity: Kaiser's need to put measures in place to protect against cyber security breach. (Tr. 128:20-23.) Such a breach occurs when an information technology asset (i.e. email) is used in an unintended manner, oftentimes to steal data or harm a computer network or system. (*Id.*) The presence of security measures such as limits on mass emailing are crucial in preventing these attacks given that 90 percent of cyber security breaches begin with email "vector," or method of entry. (Tr. 129:1-3.) Kaiser receives more than 200 million messages every month from external sources, of which 85-90 percent are discarded because they contain malicious content, or "malware." (Tr. 120:11-13; 130:13-16.)

These attacks vary in sophistication and may contain malware in the messages themselves. The "phishing" attempts are carefully designed ploys to build trust with a Kaiser employee to convince them, among other things, to share their password(s) (Tr. 132:5-8), access a malicious link or file designed to infect the entire system (Tr. 132:14-19), or hold the user's files hostage until a "ransom" payment is made. (Tr. 132:22-133:6.) Such attacks have only increased in sophistication and frequency, and are far from hypothetical situations. In May 2017, National Health Services, the primary healthcare provider in the United Kingdom, fell victim to an email attack due to the very same "ransomware" described above, joining a long list of health care institutions that had similarly been targeted. (Tr. 142:10-24.)

Although Kaiser has in place several mechanisms to screen and discard malicious emails from external services, due to technical logistics, operational necessity, and cost considerations, there are typically fewer safeguards when it comes to emails sent internally between Kaiser employees. (Tr. 134.6-16.) These internal emails are deemed "trusted" and subject to fewer controls in order to streamline ordinary day-to-day transmission of internal communications. (Tr. 135:20-25.) Thus, if mass emails were not limited, an attacker need only gain access to one employee's email account to quickly spread computer malware or viruses to hundreds of thousands of Kaiser employees simultaneously. (Tr. 137:9-138:10.)

Finally, the Mass Personal Messages Subsection is essential in preventing or mitigating the unauthorized disclosure of PHI, which includes information relating to a patient's personal identification, their medical records and conditions, and history or future health insurance details. (Tr. 170:3-9.) While Kaiser employees are extensively trained in maintaining the confidentiality of PHI, the ease and speed in which such information can be inadvertently sent or forwarded to hundreds, or even thousands, of employees presents a significant challenge to Kaiser's obligation to protect such information. (Tr. 145:4-14). Healthcare institutions such as Kaiser are the number one targets for attackers because of the value of PHI on the dark web. (Tr. 139:23-140:2.) Attackers lock the network systems with ransomware and block access to patient information, thereby shutting down medical procedures. (Tr. 140:2-5.) It is not until the

healthcare institution pays a ransom to the attackers are the networks restored. (Tr. 140: 6-8.) These threats have only increased, and have recently shut down hospitals such as MedStar, Hollywood Presbyterian, and the National Health Services in the United Kingdom. (Tr. 142:10-24.)

C. The ALJ's Decision

The ALJ issued her decision on August 24, 2018. The ALJ found that the Incidental Use Subsection violates the Act because the policy "fails to specifically state that Section 7 discussions over email are not considered personal email communications." (ALJD, 7:22-23.) The ALJ stated that "someone would have to read several sections of Respondents' Policy (which are spread throughout the Policy) altogether in order to arrive at Respondents' interpretation that Section 7 email communications are not personal." (ALJD, 7:24-26.) The ALJ concluded that "[t]his ambiguity must be resolved against Respondents." (ALJD, 7:26.)

The ALJ also found that the Mass Personal Messages Subsection violates the Act because the rule "fails to specifically state that Section 7 email communications constitute 'personal' email use, [and] such an ambiguity must be resolved against Respondents." (ALJD, 7:31-33.) The ALJ explained that "insofar as the rule bans all *personal* email distributions, without such a ban on mass *business* email distributions, it is squarely covered by the presumption that 'employee use of email for statutorily protected communications on nonworking time must presumptively be permitted by employers who have chosen to give employees access to their email.'" (ALJD, 7:33-37.)

Finally, the ALJ concluded that Respondents failed to establish "any special circumstances sufficient to justify restricting employees' personal email use." (ALJD, 8:4-5.) The ALJ found that Respondents' stated concerns over confidential PHI information being transmitted through a mass personal email "are hypothetical only" and, as such, were insufficient to justify restrictions on Section 7 activity. (ALJD, 8:21-22.)

IV. STANDARD OF REVIEW

Where exceptions to an ALJ's decision and recommended order have been filed, the Board is not bound by the findings of the ALJ and must engage in an independent review of the record. *See Standard Dry Wall Products*, 91 NLRB 544, 544-45 (1950), *enfd.* 188 F.2d 362 (3d Cir. 1951). "[T]he Act commits to the Board itself the power and responsibility of determining the facts" and the Board must base its findings "on a de novo review of the entire record." *RC Aluminum Industries*, 343 NLRB 939, 939 fn. 1 (2004) (citing *Standard Dry Wall Products*, 91 NLRB at 544-45).

On an 8(a)(1) claim, the General Counsel carries the burden of "showing that the maintenance of [a] rule would reasonably chill employees in the exercise of their Section 7 rights." *Lafayette Park Hotel*, 326 NLRB 824, 826 (1998), *enfd.* 203 F.3d 52 (D.C. Cir. 1999). The Board must dismiss the complaint if it finds that the General Counsel has failed to meet its burden. However, if the General Counsel establishes that the employer's policy adversely affects employees' protected rights, then the burden shifts to the employer to demonstrate "legal and substantial business justifications" for its conduct. *Jeannette Corp. v. NLRB*, 532 F.2d 916, 918 (3d Cir. 1976) (citation omitted).

A work rule violates Section 8(a)(1) only if it reasonably tends to chill employees in the exercise of their Section 7 rights. *Lafayette Park Hotel*, 326 NLRB at 825-27. Where a policy, "when reasonably interpreted, would potentially interfere with the exercise of NLRA rights, the Board will evaluate two things: (i) the nature and extent of the potential impact on NLRA rights, *and* (ii) legitimate justifications associated with the rule." *Boeing*, 365 NLRB slip op. at 3. Even if the rule would potentially interfere with Section 7 rights, there is no violation where "the potential adverse impact on protected rights is outweighed by justifications associated with the rule." *Id.* at 3-4.

When analyzing work rules, the Board must refrain from reading particular phrases in isolation because "limiting language can narrow the scope of a rule so that it does not infringe on the exercise of Section 7 rights." *Copper River of Boiling Springs, LLC*, 360 NLRB 459, 470

(2014) ("*Copper River*") ("[L]anguage in a rule which relates a prohibition to a specific legitimate business purpose may well affect how employees reasonably understand the scope of the rule."); *Lafayette Park Hotel*, 326 NLRB at 825 (the General Counsel may not "pars[e] the language of the rule" in hopes of extracting a violation). Moreover, the Board "must not presume improper interference with employee rights," *Copper River*, 360 NLRB at 471 (quoting *Lutheran Heritage Village-Livonia*, 343 NLRB 646, 646 (2004) ("*Lutheran Heritage*")), and it may not speculate whether a rule improperly intrudes upon Section 7 rights, *see* General Counsel's Advice Memorandum, *Cox Communications, Inc.*, Case 17-CA-087612 (Oct. 19, 2012) ("The Board will not find a violation simply because a rule could conceivably be read to restrict Section 7 activity."). Instead, a rule may be found unlawful only if—when reasonably read in context—it is "**likely** to have a chilling effect." *Lafayette Park Hotel*, 326 NLRB at 825 (emphasis added).

In this case, it is undisputed that the Electronic Asset Policy does not expressly restrict Section 7 activity, was not promulgated in response to protected activity, and has not been applied to restrict the exercise of Section 7 rights. Thus, the question is limited to whether the Incidental Use Subsection and the Mass Personal Messages Subsection would potentially interfere with Section 7 rights, and if so, whether the potential adverse impact on protected rights is outweighed by justifications associated with the rule. For the reasons discussed below, the policy's restriction on employees' personal use of Respondents' email system is lawful because of Kaiser's significant interest in protecting PHI, which outweighs any negligible impact on Section 7 rights.

V. ANALYSIS

A. The ALJ's Decision Should Be Overturned If The Board Reverses Purple Communications

(*Exception No. 1*)

The ALJ noted in her decision that "the Board recently announced it will invite [amicus] briefs to determine whether to adjust, modify or overrule *Purple Communications.*" (ALJD,

8:37-39.) Significantly, the General Counsel has filed a brief in *Rio All-Suites*, Case 28-CA-060841, urging the Board to overturn *Purple Communications*. The General Counsel provided several justifications for its request: (1) "the decision impermissibly created a right by employees to use employer-owned and-financed communication systems, even where employees possess a plethora of other means of communication"; (2) "the decision requires employers to provide and pay for employee communications in violation of their First Amendment rights"; and (3) "permitting employees to use an employer's email systems for Section 7 communications places an undue and unnecessary burden on employers' business operations, and can compromise system security and confidentiality." (Brief of General Counsel, *Rio All-Suites*, Case 28-CA-060841, 3-4 (Sept. 14, 2018).) The General Counsel concluded that the Board should overturn *Purple Communications* and, accordingly, dismiss the complaint allegations in *Rio All-Suites* that the employer violated Section 8(a)(1) by maintaining a rule on computer usage—similar to the Electronic Asset Policy here—that limited such usage to authorized users for business purposes. *Id.* at 14.

Consistent with the General Counsel's position in *Rio All-Suites*, Respondents respectfully submit that *Purple Communications* was incorrectly decided and should be overruled by the Board for the reasons stated therein. The General Counsel is on record urging that *Purple Communications* should be overturned. Counsel for the General Counsel therefore cannot, with any credibility, take the inconsistent position in this case that *Purple Communications* remains good and binding law.

Respondents further note that the analytical framework that resulted in the Board's decision in *Purple Communications* was based on the standard for the evaluation of employer policies and work rules promulgated by the Board in *Lutheran Heritage*, 343 NLRB at 646. See *Purple Communications,* 361 NLRB at 1111-12 (ALJ's Decision). In light of the Board's overruling of parts of *Lutheran Heritage* in its recent *Boeing* decision, the viability of *Purple Communications* is questionable, particularly for a case where, as here, a challenge has been made to a work rule or policy that does not **explicitly** limit an employee's right to use an

employer's email system to engage in Section 7-protected communications on nonworking time, and is therefore facially neutral. (*See* discussion, *infra*, Section V.C.) Certainly any effort to expand *Purple Communications* beyond its original boundaries—here, to an employee's *personal* use of an employer's email system—should be carefully scrutinized.

Should the Board overturn *Purple Communications* and find that employees do not have a statutory right to use their employer's email system for Section 7 purposes, Kaiser's Electronic Asset Policy must be upheld.

B. The ALJ Erred In Reading The Incidental Use Subsection And Mass Personal Messages Subsection In Isolation

(*Exception Nos. 4-6*)

The Board in *Boeing* cautioned against the "misguided belief that [] employers [must] correctly anticipate and carve out every possible overlap with NLRA coverage." 365 NLRB slip op. at 2. Here, the ALJ deliberately ignored the Board's express directions in *Boeing* by holding that Kaiser **should** have carved out every possible overlap with NLRA coverage in drafting its Electronic Assets Policy. What the ALJ failed to consider is that Kaiser did expressly exclude Section 7-based communications from the restrictions at issue in this case.

But even in *Lutheran Heritage,* the Board admonished against the picking apart of provisions of a policy in isolation, without regard to context. 343 NLRB at 646 (noting that the Board "must refrain from reading particular phrases in isolation, and…not must presume improper interference with employee rights." The ALJ here has done just that—the ALJ found that, notwithstanding the express carve-outs elsewhere in the policy, the Incidental Use Subsection and Mass Personal Messages Subsection violate Section 8(a)(1) because they "fail[] to specifically state that Section 7 discussions over email are not considered personal email communications." (ALJD, 7:22-23, 31-33.)

Contrary to the ALJ's finding, there is sufficient context within the Electronic Asset Policy from which an employee would reasonably understand that the challenged language does not encompass activity protected by the Act. *See Copper River*, 360 NLRB at 471 ("[W]here

work rules appear together in a publication, such as Respondent's employee handbook, employees reasonably would read the individual rules as part of the whole."). The Electronic Asset Policy makes clear that the restrictions within its Incidental Use Subsection do not apply to Section 7 activity. As an example, subsection 5.3.8 of the policy directly addresses Section 7 communication and provides that, although an employee may not use Kaiser's email system to solicit or proselytize for commercial ventures, religious causes, political candidates or parties, or outside organizations, the "provision does not apply to communications made by employees during non-working time that are protected under Section 7 of the National Labor Relations Act." (GC Exh. 2 § 5.3.8.) Furthermore, the context provided by the Mass Personal Messages Subsection belies any claim that a reasonable employee would construe the terms such as "personal mass mailings," "chain letters," or "jokes" as reasonably encompassing Section 7 communications between employees.

Moreover, because the Electronic Asset Policy encompasses more than just the two subsections that are at issue in this case, it is necessarily contextualized and informed by rules and definitions contained elsewhere in the policy. Section. 4.5 explicitly defines "Personal Use" as the use of emails "for personal reasons that do not relate to an employee's work for [Kaiser] or other issues relating to [Kaiser]." (GC Exh. 2 § 4.5.) Section 5.3.4 of the policy, which broadly prohibits non-solicitation use of the email system, contains a carve out for "communications made by employees during non-working time that are protected under Section 7 of the National Labor Relations Act." (GC Exh. 2 § 5.3.4.) In fact, Kaiser specifically revised its Electronic Asset Policy after the Board's decision in *Purple Communications* to comply with the majority's new rule. (Tr. 96:15-24; 110:18-22; 111:7-9.) Against this backdrop, a reasonable employee would construe the Mass Personal Messages Subsection's prohibition of "chain letters, jokes, or other personal mass mailings" as a legitimate protection of Kaiser's email system, and not a prohibition on discussions of terms and conditions of employment.

To the extent the challenged language was somehow interpreted to apply to Section 7 activity, the ALJ reached that result by improperly reading individual parts of the policy's

language in isolation and out of context. The ALJ ignored the explicit provisions clearly stating that the policy did not apply to Section 7 activity. This holding by the ALJ was in direct contravention of Board precedent, including *Lafayette Park Hotel*, 326 NLRB at 825, where the Board expressly rejected an analysis "parsing the language of the rule, viewing [a] phrase...in isolation, and attributing to [the employer] an intent to interfere with employee rights."

Plainly, it is clear that the policy in question here, when viewed in its proper context and applying the proper definitions, is entirely lawful. It simply is not enough to hone in on a few words of the policy, to the exclusion of all others, to find that certain language in a rule is broad enough to *theoretically* apply to Section 7 activity and conclude that maintenance of the rule as a whole violates the Act.

C. Even Assuming Purple Communications Remains Good Law, The ALJ Misapplied Purple Communications In This Case

(*Exception Nos. 3, 7-10*)

The ALJ relied heavily on *Purple Communications* to justify her ruling in this case. Over two vigorous dissents, the bare majority of the Board in *Purple Communications* "presume[d] that employees who have rightful access to their employer's email system in the course of their work have a right to use the email system to engage in Section 7-protected communications on nonworking time." 361 NLRB at 1063.[6] Notably, the majority stated that its decision "do[es] not prevent an employer from establishing uniform and consistently enforced restrictions, such as prohibiting large attachments or audio/video segments, if the employer can demonstrate that they would interfere with the email system's efficient functioning." *Id.* However, apart from this statement, the *Purple Communications* majority did not declare any particular work rule to be valid or invalid, nor has the Board addressed the application of the *Purple Communications* majority's newfound, "presumed" right to access of employer emails systems in subsequent cases. *Id.* at 1066 ("remand[ing] this aspect of this case...for further proceedings consistent with

[6] The viability of *Purple Communications* is in doubt. An appeal is presently pending in the Ninth Circuit, and the decision has received widespread criticism in the legal community. *See* 361 NLRB 1050 (2014), *appeal filed*, No. 17-70948 (9th Cir. April 3, 2017).

this decision"); *see also Purple Communications,* 365 NLRB No. 50, slip op. at 3 (Supplemental Decision and Order, March 24, 2017) ("*Purple Communications II*").

The limited "right" that the majority created in *Purple Communications* provides only that employees who otherwise have access to an employer's email system may use that system for Section 7-protected communications during non-working time. *See* 361 NLRB at 1063. Specifically, if the employer (1) grants employees access to the company email system in the course of their work and (2) maintains a prohibition on nonbusiness use of the company email system that is broad enough to encompass employees' use of the email system for Section 7 activities during nonworking time, this prohibition presumptively interferes with employees' Section 7 rights and violates Section 8(a)(1) of the Act unless the respondent rebuts that presumption by showing that the restrictions are justified by special circumstances necessary to maintain production or discipline. *Purple Communications II,* 365 NLRB slip op. at 4.

Here, as described further below, the email restrictions imposed by the Electronic Asset Policy were drafted to specifically comply with *Purple Communications.* The Personal Use Section, encompassing the two subsections at issue in this case, applies only to "personal use" of the employer's email system and does not encompass employees' use of the email system for Section 7 activities. Furthermore, other provisions of the policy specifically contemplate and allow for Section 7 protected communications where an explicit statement was needed to comply with *Purple Communications*. (See GC Exh. 2 § 5.3.4 (non-solicitation prohibition does not apply to "communications made by employees during non-working time that are protected under Section 7 of the National Labor Relations Act").)

The Electronic Asset Policy cannot presumptively interfere with employees' Section 7 rights, and there is no evidence that employees would construe the Electronic Asset Policy as impacting any activity arguably protected by Section 7. Regardless, the restrictions imposed by the Electronic Asset Policy, as they pertain to email use, is the type of restriction contemplated with approval by the *Purple Communications* majority. The ALJ's decision to the contrary should be reversed.

1. The Personal Use Section Is Entirely Lawful Even Under the Purple Communications Majority's Position

a) The Incidental Use Subsection allows limited use of Kaiser's email system for personal reasons and is permitted under Purple Communications

Putting aside the ALJ's erroneous finding that the Incidental Use Subsection could reasonably be read as infringing on employees' exercise of their Section 7 rights (as it applies only to "Personal Use" of the employer's email system), the majority's decision in *Purple Communications*—contrary to the findings of the ALJ—expressly approved the very type of restriction encompassed in the Incidental Use Subsection. In *Purple Communications*, the Board analyzed a policy that prohibited *all* personal use of the employer's equipment. *See* 361 NLRB at 1051 (policy states that "[a]ll such equipment and access should be used for business purposes only"). But the Board majority further stated that an employer "may apply uniform and consistently enforced controls over its email system to the extent such controls are necessary to maintain production and discipline." *Id.* at 1050.

Here, the Incidental Use Subsection of Kaiser's revised policy does not impose a total ban, but allows employees to use Kaiser's electronic assets for personal reasons on a limited basis. Its only requirement is that such use be "incidental, limited in frequency and scope, cannot incur additional costs to KP, and cannot impact employee performance." (*See* GC. Exh. 2 (2015 Policy) § 5.2.1.) By its express terms, the policy is intended to limit the use of Kaiser's email such that employee performance is not affected. Such a restriction is permissible under *Purple Communications* as a means to maintain production and discipline. *See* 361 NLRB at 1050.

b) The Mass Personal Messages Subsection complies with Purple Communications

The *Purple Communications* majority did not create a right to distribute "mass email" or extend the Act's protections to activities that may jeopardize the security or efficient operation of an employer's computer systems. *See* 361 NLRB at 1063. The Mass Personal Messages

Subsection here limits the number of recipients per message to 500 because Kaiser's email system is specifically configured to allow individual emails to no more than 500 recipients. It is built into the email system functions such that ***no one*** is allowed to send an individual email to more than 500 recipients. (Tr. 137:24-25.) This control is uniform and consistently enforced and is necessary to maintain production and network security. *See Purple Communications*, 361 NLRB at 1064 ("[W]e do not prevent an employer from establishing uniform and consistently enforced restrictions, such as prohibiting large attachments or audio/video segments, if the employer can demonstrate that they would interfere with the email system's efficient functioning.") Because the email cap applies to all messages sent by individual employees on Kaiser's network, it is content neutral and does not distinguish between mass personal emails or mass emails sent for Section 7 purposes. *Purple Communications* expressly allows such a policy.

It should also be noted that the propriety of Respondents' rules against mass emails was previously reviewed by the Division of Advice in 2009. *See Kaiser Permanente*, 37 NLRB AMR 73 (2009). In a pre-*Purple Communications* decision, the Division of Advice gave explicit approval of Kaiser's mass email and incidental personal use rules, the language of which was the model for the language of the current provisions at issue.[7] The Division of Advice expressly stated in its opinion that "employer rules against mass emails strike a balance between employees' Section 7 rights and the Employer's legitimate business interest in ensuring the proper functioning of its email system." Although this finding was made by the Division of

[7] Indeed, by comparing the current version of the policy (Joint Ex. 1) with the 2008 version of the policy (Respondent's Ex. 1), it is apparent that the policy language in the 2008 version of the policy approved by the Board in 2009 is substantially similar to the current version of the policy, but for Kaiser limiting the mass email restriction in the current version to "personal use." (*Compare* Joint Ex. 1 § 5.2 *with* Respondent's Ex. 1 §§ 5.2.4 and 5.4.1.2.) Had Kaiser been able to present a full history of the policy's revisions, Kaiser would have been able to further explain that this revision was made specifically to comply with *Purple Communications.* However, the ALJ sustained the General Counsel's objection to Respondent's presentation of testimony and documentary evidence of all prior versions of the policy except for the original 2008 version, including Respondent's proffer of the version of the policy as it existed immediately prior to the latest revision, on grounds of relevance. (Tr. 85:7-88:10.) To the extent that the ALJ's ruling handicapped their ability to proffer an explanation, on a full record, of Respondents rationale for its drafting choices while revising the policy to comply with *Purple Communications*, Respondents believe that this evidentiary ruling was made in error and take exception to this finding. (*Exception No. 12*)

Advice based on the prior precedent of *Register-Guard,* this finding is not inconsistent with *Purple Communications*' acknowledgement that employers may "apply uniform and consistently enforced controls over their email systems to the extent that such controls are necessary to maintain production and discipline." 361 NLRB at 1063. Respondents reasonably relied on the Division of Advice's own analysis in deciding how to revise its policies to comply with *Purple Communications*.

2. The ALJ's Finding That Special Circumstances Do Not Justify The Limited Restrictions to Personal Email Use Encompassed In The Incidental Use Subsection And Mass Personal Messages Subsection Should Be Reversed

The ALJ erred in finding an absence of special circumstances sufficient to justify the restriction on employees' personal use of Kaiser's email system in the Incidental Use Subsection and Mass Personal Messages Subsection. Contrary to the ALJ's finding, the policies' limitations are fully justified by special circumstances attendant to a hospital/healthcare environment such as Kaiser and are necessary to maintain production, discipline, and compliance with its obligations to protect PHI under the Health Insurance Portability and Accountability Act ("HIPAA").

The ALJ erroneously found that Kaiser failed to "establish[] any special circumstances sufficient to justify restricting employees' personal email use." (ALJD, 8:4-5.) The ALJ rejected Kaiser's argument that any purported restrictions on Section 7 communications are justified by "special circumstances inherent in the hospital industry, vis-à-vis, protecting PHI and the requirements under the [HIPAA] Act." (ALJD, 8:15-16.) The ALJ concluded that although Kaiser's concerns are "well founded," they are nevertheless "hypothetical only." (ALJD, 8:22.) Ultimately, the ALJ found that the policies violate the Act because "Respondents failed to demonstrate evidence that any employee has ever transmitted PHI information via Respondents' email system to 500+ recipients." (ALJD, 8:22-24.) The ALJ also determined that to the extent any risk that confidential PHI information may be disclosed, that risk "was created by

Respondents when it granted employees email access during business hours in the first place." (ALJD, 8:24-26.)

Under Purple Communications, the presumption that employees who have been given access to their employer's email system in the course of their work are entitled to use the system to engage in statutorily protected discussions may be rebutted by a showing of "special circumstances that justify specific restrictions." 361 NLRB at 1054. "The employer's restrictions should be based upon the nature of its business." Andranaco Industries, Case 07-CA-160286, 2016 WL 1592701 (Apr. 20, 2016) (citing Purple Communications, 361 NLRB 1050).

Certainly, notwithstanding the ALJ's findings, Kaiser takes the position that the policy provisions at issue do not in any way restrict an employee's use of its email system for statutorily protected discussions. But if the ALJ had been justified in finding that the provisions had the potential for restricting protected speech, the ALJ here failed to consider the special circumstances presented by Kaiser and which are inherent in the hospital industry that justify the provisions' limited restrictions.

As a healthcare institution, Kaiser is legally bound to protect PHI under HIPAA and is subject to fines and penalties for any violation. Kaiser's obligation to protect PHI is also rooted in its contractual requirements with entities that purchase its health insurance, including employer groups that purchase insurance for its employees and governmental purchasers that provide coverage through Medicare, Medi-Cal, and state employee programs. These contracts similarly impose penalties for violations. (Tr. 173:14-19.) In addition to fines, the Joint Commission for Healthcare Organizations and the National Committee on Quality Assurance may revoke Kaiser's accreditation or license for breaching its duty to safeguard PHI. Kaiser therefore has a compelling interest in protecting PHI, which has proven to be highly valuable to internet hackers seeking ransom payments. Should Kaiser be required to permit employee use of its email system for unrestricted personal communications during business hours, the risk that those communications may transmit confidential PHI is significantly heightened, in turn leading to potentially catastrophic consequences for Kaiser. This risk vastly outweighs the marginal and

speculative benefits that might be obtained by opening up Kaiser's network to unrestricted personal communications.

The ALJ dismissed Kaiser's concerns over confidential PHI being transmitted through a mass personal email as merely "hypothetical." (ALJD, 8:21-22.) First, it thus appears from the ALJ's faulty reasoning that Kaiser had to have suffered from a problem before it could address the potential issue with a policy. This is akin to prohibiting the sale of fire insurance to anyone who has not suffered a fire. Second, as shown by the evidence at the hearing, there is a very real risk that PHI may be transmitted via Kaiser's email system, and Kaiser reasonably believed that limiting the personal emails on the system would limit the improper use of PHI. The ALJ inexplicably rejected this reasoning, concluding that the risk to improper use of PHI "was created by Respondents when it granted employees email access during business hours in the first place...." (ALJD, 8:24-26.) This is directly contrary to the policy at issue and the evidence presented at the hearing. The use of PHI on the system for business reasons allows for better patient care and outcomes. By contrast, there is no such proper use of PHI in personal emails. In finding to the contrary, and reasoning backwards from this false premise, the ALJ has placed Kaiser in an impossible bind: either provide employees access to email in order to allow them to provide the necessary services to members and accept the risk that employees may somehow violate HIPAA in connection with work-related emails, ***or*** prohibit employees from using the email system altogether, thereby restricting Kaiser's ability to provide a superior standard of care to its members and patients. And the ALJ did all of this analysis under the National Labor Relations Act! Even given its most expansive reading, *Purple Communications* cannot be read to conclude that the NLRA compels Kaiser to compromise its business in this manner.

The ALJ's dismissal of Kaiser's stated concerns over the transmission of PHI as merely "hypothetical" also imposes an insurmountable burden on employers seeking to adopt policies that preemptively address workplace issues. The ALJ concluded in this case that "Respondents failed demonstrate evidence that any employee has ever transmitted PHI information via Respondents' email system to 500+ recipients." By the ALJ's logic, an employer must wait for

an actual violation before adopting a policy to address the violation. An employer may not, for instance, adopt a policy prohibiting weapons in the workplace until after an employee is found in possession of such a weapon in the workplace. Nothing in *Purple Communications* mandates such an arbitrary and capricious limitation on an employer's adoption of reasonable policies.

D. The ALJ Erred By Failing To Apply The Balancing Test Mandated By Boeing

(*Exception No. 2*)

The ALJ further misapplied Board precedent in reaching the erroneous conclusion that the Incidental Use Subsection and the Mass Personal Messages Subsection were unlawfully overbroad. In *Boeing*, the Board overturned its decision in *Lutheran Heritage*, 343 NLRB 646, which had found that a policy violates Section 8(a)(1) where "employees would reasonably construe the language to prohibit Section 7 activity." The Board found the *Lutheran Heritage* "reasonably construe" standard to be "too simplistic" because it fails to adequately take into account legitimate employer justifications associated with the work rule. 365 NLRB slip op. at 2. The Board specified that the *Lutheran Heritage* standard ran afoul of Supreme Court precedent "because it [did] not permit ***any*** consideration of the legitimate justifications that underlie many policies, rules and handbook provisions." *Id.* at 8 (emphasis in original). The Board corrected this defect in *Boeing* and overturned *Lutheran Heritage*, consequently adopting a new standard to evaluate facially neutral work rules. Where a rule may be construed to prohibit protected activity, the Board held that it must evaluate: "(i) the nature and extent of the potential impact on NLRA rights, and (ii) legitimate justifications associated with the rule." *Id.* at 3. Even if a rule would potentially interfere with Section 7 rights, there is no violation where "the potential adverse impact on protected rights is outweighed by justifications associated with the rule." *Id.* at 3-4.

In the present case, the ALJ evaluated the Incidental Use Subsection and the Mass Personal Messages Subsection only under the standards of *Purple Communications*. The Board has expressly stated, however, that facially neutral rules—like the ones here—must be evaluated

under the test articulated in *Boeing*. But contrary to *Boeing*, the ALJ evaluated only whether the policies could, through some twisted and out of context reading, be construed to prohibit protected activity, and then completely failed to weigh Kaiser's interest in the rules against the nature and extent of the potential impact on protected rights. There can be no doubt that Kaiser's pervasive and compelling interest in protecting confidential PHI, as mandated by federal law, substantially and unequivocally outweighs any potential or theoretical impact the Incidental Use Subsection and the Mass Personal Messages Subsection have on Section 7 rights.

1. Kaiser's Paramount Interest In Protecting PHI Is Unassailable And Justifies Its Policy Prohibiting Mass Personal Messages

Where an employer has an overriding interest in protecting confidential patient information, a workplace policy is not unlawfully overbroad even if it also encompasses certain Section 7 activity. *See Flagstaff Medical Center*, 357 NLRB 659 (2011), *enfd. in relevant part* 715 F.3d 928 (D.C. Cir. 2013) ("*Flagstaff*"); *Boeing*, 365 NLRB No. 154. There is no basis to distinguish the Incidental Use Subsection and the Mass Personal Messages Subsection from the rules found lawful in *Flagstaff* and *Boeing*. The premise of the ALJ's holding that the policies here are unlawful misconstrues the governing legal doctrine of *Flagstaff* and *Boeing* because it fails to consider the weight of Kaiser's interest in protecting confidential PHI.

In *Flagstaff*, the employer maintained a policy that banned the use of electronic equipment during work time and further provided that the use of cameras for recording images of patients and/or hospital equipment, property, or facilities is prohibited. The Board held that the rule restricting photography of hospital property was **not** unlawfully overbroad and did **not** reasonably tend to interfere with Section 7 activities because the hospital had an overriding interest in maintaining compliance with HIPAA and a concomitant obligation to prevent the wrongful disclosure of PHI. 357 NLRB at 663. The Board's rationale for its decision was based entirely on the hospital's "weighty" interest in protecting the privacy interests of patients:

> Further, like the judge, and contrary to our dissenting colleague, we find that employees would not reasonably interpret the rule as restricting Section 7 activity.

> The privacy interests of hospital patients are weighty, and [the employer] has a significant interest in preventing the wrongful disclosure of individually identifiable health information, including by unauthorized photography. See, e.g., 42 U.S.C. § 1320d-6 (prohibiting wrongful disclosure of individually identifiable health information). Employees would reasonably interpret [the employer's] rule as a legitimate means of protecting the privacy of patients and their hospital surroundings, not as a prohibition of protected activity.

Id. at 663.

Similar to *Flagstaff*, the Board in *Boeing* found that the employer's no-recording policy was lawful even though the rule might prevent employees from using photography to memorialize their Section 7 activity. The Board noted that there was no allegation that the rule had "actually interfered" with Section 7 conduct. Therefore, it concluded, the rule posed only a "comparatively slight" risk to employees' Section 7 rights. The Board then turned to Boeing's asserted justifications associated with the rule, which included both internal and government mandated security protocols, proprietary and employee privacy interests, as well as industrial espionage concerns. Finding these justifications "especially compelling," the Board held that they outweighed the "comparatively slight" risk to employees' Section 7 rights.

Application of the new balancing test pursuant to *Boeing* mandates dismissal of the complaint here because none of the challenged rules interferes with protected activity and each is justified by legitimate business interests. As an initial matter, the Incidental Use Subsection and Mass Personal Messages Subsection are explicitly limited to a subclass of communications: personal communications. By definition, this expressly excludes employee communications related to work. It is thus essentially impossible that the policy would operate to infringe on protected Section 7 conduct, or that it would be reasonably construed to do so. Put differently, the chance that a reasonable employee would understand this rule to bar them from discussing terms and conditions of employment, because such communications were somehow "not related

to work" is, under the standard set in *Boeing,* "comparatively slight" if not downright nonexistent.

Furthermore, the Electronic Asset Policy's stated justification—to protect confidential and sensitive PHI—is compelling, particularly in light of Kaiser's unique hospital setting subject to HIPAA. As noted, Kaiser is legally obligated to adopt safeguards to protect against the disclosure of PHI. Kaiser's interest in protecting PHI significantly outweighs any potential impact on the exercise of Section 7 rights, and is the same "weighty" interest upheld by the Board in *Flagstaff.* The Electronic Asset Policy is thus lawful under the *Boeing* balancing test.

E. The ALJ's Remedy And Order Are Inappropriate

(*Exception No. 11*)

As set forth above, the ALJ's findings and conclusions are inconsistent with the record evidence and applicable law. As a result, the ALJ's recommended remedy and order are also inconsistent with the record evidence and applicable law, and therefore should not be adopted.

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VI. CONCLUSION

For the foregoing reasons, Respondents respectfully request that the Board refuse to adopt the ALJ's findings and conclusions with regard to the Incidental Use Subsection and Mass Personal Messages Subsection, and dismiss the complaint.

DATED: October 22, 2018

Respectfully submitted,

By: _____

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